IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 20, 2006

PAUL L. HAWKINS and JAMES EARL LOFTON
v.
STATE OF TENNESSEE

Appeal from the Circuit Court for Wayne County
No. 13811 & 13828 Robert Holloway, Judge

No. M2005-02807-CCA-R3-HC - Filed July 27, 2006

The Appellants, Paul L. Hawkins and James Earl Lofton, proceeding *pro se*, jointly appeal the Wayne County Circuit Court's summary dismissal of their separate petitions for writ of habeas corpus. Hawkins and Lofton were each found to be habitual criminals, and, as a result, are serving sentences of life imprisonment in the Department of Correction. On appeal, Hawkins and Lofton contend that their "habitual criminal convictions" are illegal and void because Tennessee's habitual criminal statute is unconstitutional in its application. After review, we affirm the trial court's summary dismissal of the petition finding the issue to be without merit.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

Paul L. Hawkins and James Earl Lofton, *Pro Se*, Clifton, Tennessee.

Paul G. Summers, Attorney General and Reporter; Leslie Price and Brian C. Johnson, Assistant Attorneys General, for the Appellee, State of Tennessee.

OPINION

Procedural History

On July 11, 1984, Hawkins was found to be a habitual criminal by a Shelby County jury based upon his conviction for the underlying offense of first degree burglary and was sentenced to life imprisonment. Hawkins subsequently filed a petition for post-conviction relief, which was denied at the trial level, and, on appeal, this court affirmed. *Paul L. Hawkins v. State*, C.C.A. No. 61 (Tenn. Crim. App. at Jackson, Aug. 1, 1990).

On April 19, 1985, Lofton was convicted by a Shelby County jury of larceny from the person, armed robbery, and assault with intent to commit first degree murder. As a result of these convictions, he received three life sentences, two of which he was to serve consecutively as a habitual offender. This court affirmed Lofton's convictions and sentences upon direct appeal. *State v. James Earl Lofton*, C.C.A. No. 39, (Tenn. Crim. App. at Jackson, Feb. 5, 1986). Lofton subsequently filed a petition for post-conviction relief in the Shelby County Criminal Court, which was denied. On appeal, this court vacated Lofton's 1970 conviction for third degree burglary but upheld the jury's finding of habitual criminality. *James Earl Lofton v. State*, No. 02C01-9306-CR-00111 (Tenn. Crim. App. at Jackson, Jan. 11, 1995). Subsequently, Lofton appealed the trial court's denial of post-conviction relief asserting that his habitual criminal status was invalid because this court vacated his 1970 conviction. This court affirmed Lofton's convictions and determined that Lofton's habitual criminal status had been previously determined. *Jimmy Earl Lofton v. State*, No. 02C01-9603-CR-00073 (Tenn. Crim. App. at Jackson, Mar. 7, 1997).

Hawkins, proceeding *pro se*, filed a petition for habeas corpus relief on July 13, 2005. Lofton, proceeding *pro se*, filed a petition for habeas corpus relief on July 29, 2005. Both argued that the habitual criminal statute under which they were sentenced was unconstitutional. The trial court denied both petitions without hearings on September 16, 2005. The Appellants filed a "Joint Notice of Appeal" on October 20, 2005, raising a question of law common to both cases.

Analysis

Initially, we note that although there is no order from the lower court consolidating the two separate appeals, this court by order consolidates the appeals under Tennessee Rule of Appellate Procedure 16(b), which permits consolidation when two "cases obviously involve common questions of law and that the severance of the cases at this juncture would result in the unnecessary waste of judicial resources." Additionally, the record reflects that the Appellants did not timely file their notice of appeal. The trial court's order was entered on September 16, 2005, but the notice of appeal was not filed until October 20, 2005. In the interest of justice, however, we waive the timely filing of the notice of appeal. *See* Tenn. R. App. P. 4(a).

Tennessee allows habeas corpus relief under narrow grounds. *McLaney v. Bell*, 59 S.W.3d 90, 92 (Tenn. 2001). An appellant's habeas corpus petition must show that a judgment is "void" and not merely "voidable." *Id*. (citing *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999)). The jurisdictional defect must appear on the original trial record to create a void judgment. *Id*. at 92-93 (citing *State v. Richie*, 20 S.W.3d 624, 630 (Tenn. 2000)). In other words, "the writ will issue only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that a court lacked jurisdiction or authority to sentence a defendant or that the sentence has expired." *Id.* at 93 (citing *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000); *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993)). Where the assertions in a petition for writ of habeas corpus do not establish a void judgment, a trial court may dismiss the petition without a hearing. *Id*. (citing T.C.A. § 29-21-109 (2000); *Archer*, 851 S.W.2d at 164). Our review of a denial

of habeas corpus relief is a question of law subject to *de novo* review without a presumption of correctness given to the findings of the lower court. *Id.* at 92.

The Appellants allege that the crimes for which they were convicted, and which resulted in their convictions as habitual criminals, occurred after the enactment of the Tennessee Sentencing Reform Act of 1982. As such, they argue that they should have been sentenced as persistent offenders under the 1982 Act rather than under the habitual criminal statute.[1] As authority, they assert that the 1982 Sentencing Act is referred to as a comprehensive sentencing act and that the applicability clause of the Act, Tennessee Code Annotated section 40-35-112(a) (1982), expressly provides: "All persons who commit crimes on or after July 1, 1982 shall be tried and convicted under this chapter."

Although the Appellants acknowledge the provision of the 1982 Act which states, "[n]othing herein shall prohibit the operation of the habitual criminal act provided that if the defendant is acquitted of being an habitual criminal, the court shall conduct a sentencing hearing on the underlying felony as provided in this chapter, T.C.A. § 40-35-203(d)," they do not acknowledge this provision cures the constitutional defect. The defect, as argued by the Appellants, is that the inclusion of two separate but applicable sentencing provisions permits the State to select the particular punishment under which it wishes to proceed, thus, violating due process. Moreover, the Appellants argue that because the 1982 Sentencing Act was enacted after the habitual criminal act, the habitual criminal act was repealed by implication.

We find these arguments misplaced. As acknowledged, the 1982 Sentencing Act contains the express provision that: "[n]othing [in the 1982 Sentencing Act] herein shall prohibit the operation of the habitual criminal act . . . ." T.C.A. § 40-35-203(d) (1982). It is fundamental that the task of allocating punishment lies with the legislature. The legislature is within its authority to impose imprisonment beyond the maximum for the offense committed for those "hardened offenders who have not been deterred from a life of crime by prior conviction and punishment." *McCummings*

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[1] Tennessee Code Annotated section 39-1-801 (1982) (rep. 1989) provided:

> Any person who has either been three (3) times convicted within this state of felonies, not less than two (2) of which were among those specified in §§ 38-2-103, 39-605 [repealed], 39-2-111, 39-2-112, 39-2-640, 39-6-417(a)(1)(A), 40-20-112 or were for a crime punishable by death under existing law, but for which the death penalty was not inflicted, or who has been (3) times convicted under the law of any other state, government or country of crimes, not less than two (2) of which, if they had been committed in this state would have been among those [previously] specified . . . shall be considered, for the purposes of this part, and is declared to be an habitual criminal. . . .

Tennessee Code Annotated section 40-35-106(a) (1982) provided that a persistent offender is a defendant who has received:

> (1) Two (2) or more prior felony convictions for offenses committed within five (5) years immediately preceding the commission of the instant offense; or
> (2) Four (4) or more prior felony convictions for offenses committed within ten (10) years immediately preceding the commission of the instant offense.

v. State, 134 S.W.2d 151, 152 (Tenn. 1939); *State ex rel Ves v. Bomar*, 376 S.W.2d 446 (1964). The legislature is not precluded in adopting other sentencing classifications based upon prior convictions simply because the State has a recidivist statute for habitual criminality.

Moreover, we conclude that the 1982 Sentencing Act is not in conflict with the habitual criminal act, and, as recognized by this court, "the fact that the [habitual criminal] statute allows prosecutional selectivity in its application creates no constitutional infringement." *State v. Jackson*, 697 S.W.2d 366, 373 (Tenn. Crim. App. 1985). Finally, we would observe that in *Wayne Davidson v. Ricky Bell, Warden*, No. M2003-01128-CCA-R3-HC (Tenn. Crim. App. at Nashville, Sept. 27, 2004), *perm. to appeal denied* (Tenn. Feb. 28, 2005), a panel of this court addressed virtually the identical issue presented on appeal by the Appellants in this case and concluded that the habitual criminal statute did not violate the equal protection or due process clauses of the constitution.

CONCLUSION

The judgment of the Wayne County Circuit Court is affirmed..

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DAVID G. HAYES, JUDGE